

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18CV1776
21MD2998
(JRT/JFD)

Minneapolis, Minnesota
October 17, 2022
10:06 A.M.

BEFORE THE HONORABLE JUDGE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE

AND

MAGISTRATE JUDGE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(CASE MANAGEMENT CONFERENCE & FINAL FAIRNESS HEARING)

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1 10:06 A.M.

2
3 (In open court.)

4 THE COURT: You may be seated. Good morning,
5 everyone. It is good to see you all today. This is
6 Multi-District Litigation 21-2998, and we're here for an
7 initial case management conference. I wouldn't say initial
8 since things have been going on for a while, but at least
9 an in-person conference.

10 So we should have counsel note appearances. I
11 will just try to make it a little bit orderly here. First
12 for the Direct Purchaser Plaintiffs.

13 MR. POUYA: Bobby Pouya, Pearson Simon & Warshaw,
14 for the direct purchasers.

15 MR. CLIFFORD PEARSON: Good morning, Your Honor.
16 Clifford Pearson, DPPs.

17 MR. BRUCKNER: Good morning, Your Honor. Joe
18 Bruckner, Lockridge Grindal Nauen, for the direct
19 purchasers.

20 MR. BOURNE: Good morning, Your Honor. Joe
21 Bourne for Direct Purchaser Plaintiffs.

22 THE COURT: All right. Excellent. Thank you.
23 The Consumer Indirect Purchaser Plaintiffs.

24 MR. HEDLUND: Good morning, Your Honor. Dan
25 Hedlund, Gustafson Glick.

1 MR. RISSMAN: Good morning, Your Honor. Josh
2 Rissman, Gustafson Glick.

3 MS. LOOBY: Michelle Looby, Gustafson Glick.

4 THE COURT: All right. Great. Excellent.

5 So the Commercial and Institutional Indirect
6 Purchaser Plaintiffs.

7 MR. RAITER: Good morning, Your Honor. Shawn
8 Raiter, Larson King.

9 MR. FINLEY: Good morning, Your Honor. Blaine
10 Finley, Cuneo Gilbert & LaDuca.

11 THE COURT: All right. We have got you.

12 Direct Action Plaintiffs, let's see.

13 Commonwealth of Puerto Rico?

14 MR. BATES: Good morning, Your Honor. Kyle Bates
15 for the Commonwealth of Puerto Rico.

16 THE COURT: All right. Very well.

17 And I don't think we have anyone here from
18 Winn-Dixie Direct Action Plaintiffs, I don't believe, and
19 the Dollar General Direct Action Plaintiffs.

20 MR. RODRIGUEZ: Good morning, Your Honor.

21 Alberto Rodriguez from Sperling & Slater.

22 THE COURT: All right. Good morning.

23 Cheney Brothers?

24 MR. YEARICK: Good morning, Your Honor. Garth
25 Yearick from Carlton Fields.

1 THE COURT: Okay.

2 And Kroger Direct Action Plaintiffs?

3 MR. RANDALL: Good morning, Your Honor. Samuel
4 Randall from Kenny Nachwalter.

5 THE COURT: All right.

6 Topco.

7 MR. KAPLAN: Robert Kaplan, Kaplan Fox &
8 Kilsheimer LLP. Your Honor, good morning.

9 THE COURT: Good morning.

10 Okay. Aldi?

11 MR. CARLOCK: Good morning, Your Honor. Wyatt
12 Carlock from Baker Botts.

13 THE COURT: Very well.

14 And Sysco.

15 MR. GANT: Good morning, Your Honor. Scott Gant
16 from Bois Schiller Flexner.

17 THE COURT: Very well.

18 And Nestle?

19 MR. EDDY: Good morning, Your Honor. David Eddy
20 from Nexsen Pruet for the Nestle DAPs.

21 THE COURT: Very well. I don't think we have
22 anyone here from Kraft.

23 All right. Defendants. Clemens Food Group?

24 MR. JOHNSON: Good morning, Your Honor. Mark
25 Johnson, Greene Espel, and folks from Kirkland Ellis are on

1 the line.

2 THE COURT: Okay. Very well.

3 Hormel?

4 MS. CHOW: Good morning, Your Honor. Emily Chow
5 from Faegre Drinker.

6 THE COURT: All right. Good morning to you.

7 JBS?

8 MR. RASHID: Good morning, Your Honor. Sami
9 Rashid from Quinn Emanuel Urquhart & Sullivan.

10 MS. NELSON: Good morning, Your Honor. Jessica
11 Nelson from Spencer Fane.

12 THE COURT: All right. Very well.

13 And Seaboard?

14 MR. SCHWINGLER: Good morning, Your Honor. Peter
15 Schwingler from Stinson.

16 THE COURT: Good morning to you. Seeing everyone
17 that I have seen over Zoom many times. It's nice to see
18 you in person.

19 Let's see. Smithfield?

20 MR. COTTER: Good morning, Your Honor. John
21 Cotter from Larkin Hoffman. I am also here with John
22 Kvinge from Larkin Hoffman, and Brian Robison is on the
23 phone.

24 THE COURT: All right. Very well.

25 Triumph Foods?

1 MR. SMITH: Good morning, Your Honors.

2 Christopher Smith, Husch Blackwell.

3 THE COURT: Very well.

4 And Tyson.

5 MR. TAYLOR: Good morning. Jarod Taylor from
6 Axinn Veltrop & Harkrider. My colleague Tiffany Rider is
7 also on by phone, and David Graham from Dykema is also here
8 with me this morning.

9 THE COURT: Very well. Did I miss anybody?

10 All right. Very well. Again, thank you for
11 coming in today. I apologize it's a little bit of a chilly
12 morning here in Minnesota, but it will get colder, so we
13 will fortunately try to do just about everything we can
14 over Zoom as we go forward and save time and costs and will
15 enable people to participate more fully.

16 So I wanted to have Magistrate Judge Docherty
17 with here today. This is a little unusual. In the MDLs
18 I've handled in the past, I have handled nearly all of it
19 myself without the assistance of a magistrate judge, but
20 since this case and the Beef case have been proceeding for
21 some time with the expert direction of our magistrate
22 judges, I thought it helpful to keep that process going.

23 And so Magistrate Judge Docherty has joined us in
24 this case with the retirement of Judge Bowbeer.

25 So I wanted to go through first the issues for

1 discussion today in the status conference. There is a
2 number of matters we want to try to resolve this morning.
3 I anticipate Magistrate Judge Docherty kind of running the
4 schedule going forward, along with handling all
5 nondispositive matters, and let's see.

6 And we will probably issue a quick order after
7 the hearing on the leadership structure, but I wanted to
8 hear from everyone first, anything that anyone would like
9 to say today, but first, I'm not sure there is anything we
10 need to address on procedural status.

11 I think there are 30 cases that have been filed
12 by Direct Action Plaintiffs that have been centralized. I
13 think that's accurate. Anyone wish to talk about the
14 procedural status at this stage?

15 All right. Now, discovery status, I know you
16 have been addressing this, Judge Docherty. Anything you
17 want to say about the discovery at this point?

18 MAGISTRATE JUDGE DOCHERTY: Good morning,
19 everyone. The only thing, my understanding of the status
20 of any outstanding discovery matters is as follows, and if
21 I miss anything or if there is anything to contribute,
22 please speak up.

23 It looks like there are a fair number of
24 depositions that are going to have to be taken after
25 October the 31st, which is the cutoff for fact discovery.

1 Judge Tunheim and I spoke about that before taking the
2 bench this morning. An extension to allow that is not
3 going to be a problem.

4 I believe that there was in the written, in the
5 past tense, in your joint letter to me a motion to compel
6 concerning non-fed data. That has been ruled on. It's
7 under seal, but it has been ruled on. It's on the docket,
8 and I assume it's accessible to all of you.

9 And then there is a pending request for letters
10 rogatory that I have not honestly done much with yet, but
11 it's going to be a priority given the clunkiness of the
12 letters rogatory process.

13 So that's my take on sort of the action items for
14 fact discovery. Is there anything that I have missed or
15 that we should talk about before going on?

16 Yes, sir. And your name --

17 MR. EDDY: David Eddy, Nexsen Pruet LLC, for the
18 Nestle DAPs.

19 Your Honor, I think you may have conflated the
20 order that you entered yesterday in Beef on the motion to
21 compel.

22 MAGISTRATE JUDGE DOCHERTY: I am sorry.

23 MR. EDDY: I have a pending motion to compel
24 which you heard on October 5 which is under advisement, and
25 I just wanted to set that straight for the record.

1 MAGISTRATE JUDGE DOCHERTY: Thank you. I
2 appreciate that. I did indeed conflate those two, and it
3 probably won't be the last time. I'm sorry.

4 Sir?

5 MR. BOURNE: Good morning. Joe Bourne from
6 Lockridge Grindal Nauen for the Direct Purchaser
7 Plaintiffs.

8 I wanted to add, Your Honor, in addition to
9 certain fact witness depositions that are going to have to
10 occur after October 31st, the parties have been discussing
11 an extension for answers to certain written discovery, such
12 as contention interrogatories, to conclude after the
13 depositions are complete, and we anticipate no issues among
14 the parties reaching agreement as to that.

15 MAGISTRATE JUDGE DOCHERTY: All right. Do the
16 parties have a view as to what the appropriate length of an
17 extension in fact discovery would be? Since you're at the
18 podium, I guess you get to start.

19 MR. BOURNE: Your Honor, the parties have not
20 discussed a wholesale extension of fact discovery.
21 Instead, we anticipated seeking certain or conducting
22 certain depositions and answering certain written discovery
23 after the close of fact discovery so that, you know, it
24 wouldn't be a wholesale continuation. It would just be
25 certain limited items.

1 However, the parties have not -- if Your Honor
2 believes that a general extension of a certain amount of
3 time would be appropriate, I would imagine that 30 days or
4 somewhere between 30 and 60 days might be appropriate.
5 However, the parties have not met and conferred about that.

6 MAGISTRATE JUDGE DOCHERTY: Okay. Is this
7 something the parties should perhaps meet and confer on
8 before the November 17th status conference with the
9 understanding that there won't be any problem with taking
10 depositions between October 31st and November 17th?

11 MR. BOURNE: Yes, Your Honor. We will do that.

12 MAGISTRATE JUDGE DOCHERTY: Okay. Anyone object
13 to that framework for going forward?

14 All right.

15 MR. TAYLOR: Your Honor, Jared Taylor for the
16 Tyson defendants. Defendants do not object to speaking
17 with plaintiffs about this issue in advance of the next
18 conference, but I think we would just want to note that,
19 you know, our position might be that no general extension
20 is warranted.

21 I think defendants are happy with the certainty
22 that there won't be, for example, any additional written
23 discovery and would instead prefer to address discrete
24 issues individually, as Mr. Bourne explained that we have
25 been doing to date.

1 So just a preview as to what our position is
2 likely to be.

3 MAGISTRATE JUDGE DOCHERTY: Understood. Thank
4 you.

5 MR. FINLEY: Good morning, Blaine Finley, on
6 behalf of the Commercial Indirect Purchaser class. In
7 addition with any potential extension of discovery, my
8 class, and possibly the consumer class, would be interested
9 in meeting and conferring to receive clarification and
10 whether that extension would allow us to ask questions at
11 the depositions of any opt-out plaintiffs that may resell
12 the products in question to our class members.

13 My group at least would take the position that
14 such question would be appropriate in the vein of
15 efficiency so that we can have one deposition where there
16 is defendant questioning and if necessary questioning from
17 my class of these distributors that buy these products from
18 defendants and resell to my group's class members.

19 MAGISTRATE JUDGE DOCHERTY: Okay. I'm hearing a
20 fair amount of information that probably is better suited
21 for a meet and confer and is not quite ready for prime time
22 here this morning.

23 MR. GANT: Scott Gant from Bois Schiller Flexner
24 for Sysco and Emery DAPs.

25 To your point, Your Honor, the issue that

1 Mr. Finley just raised was not previewed with us, came as a
2 surprise to me to hear him raising it just now. This has
3 been the subject of discussion between the two indirect
4 classes and Direct Action Plaintiffs for months.

5 It had been dropped and not addressed for at
6 least 45 days. So I was surprised to hear it, and I take
7 your suggestion, Your Honor, that we discuss this outside
8 of the context of today's conference.

9 THE COURT: All right.

10 Mr. Hedlund?

11 MR. HEDLUND: Good morning, Your Honors. Great
12 to see you all in person.

13 We would join Mr. Finley's statement with regard
14 to wanting to follow up on those DAP depositions in terms
15 of the pass-through issues, but agree that we can discuss
16 them in a meet and confer.

17 MAGISTRATE JUDGE DOCHERTY: Okay. All right.

18 THE COURT: Okay. Very well. We will get this
19 moving.

20 Anything on the status of motions? Let's talk
21 about the class action hearing because we've got that
22 process moving along quite well, and I think we have
23 different views as to the timing of the hearing.

24 Anyone wish to speak to that this morning?

25 Mr. Pouya?

1 MR. POUYA: Thank you, Your Honor. Bobby Pouya
2 for the Direct Purchaser Plaintiffs.

3 So the parties' position on the class
4 certification hearing and scheduling process were set forth
5 in docket number 1511 filed on September 23rd. For the
6 class plaintiffs what we proposed is that we have a hearing
7 on December 19th of this year. That is slightly earlier
8 than we had anticipated, but there is two, two reasons for
9 that.

10 One is in terms of a change in the structure of
11 the schedule. What we had anticipated was for the
12 plaintiffs to potentially file a *Daubert* motion against the
13 defense experts. What we decided is, that's not necessary.
14 So those dates that were related to that motion practice
15 have moved off the calendar.

16 They're no longer applicable, and that's what
17 previously took the briefing through February 6th of 2023.
18 The other thing that we have done is, we have determined
19 that we're willing to shorten the timing for our opposition
20 to the *Daubert* motions, to file those oppositions on
21 November 1st rather than November 18th, and relatedly any
22 rebuttal expert reports will be moved up from November 18th
23 to November 1st.

24 And then defendants' schedule for their replies
25 in support of their *Daubert* motions would move up in kind.

1 The reply briefing for our class certification would stay
2 the same, and it would be put in approximately a month
3 before the class certification hearing. The *Daubert*
4 motions will be completed.

5 Part of the reasons we're willing to do it is, we
6 can accommodate it based on the current schedule. We
7 believe it's sufficient. Takes away briefing over the
8 holidays, but we also understood in contacting the Court
9 that the Court will be in trial from January through March
10 of 2023 and that this was the only, potentially the only
11 hearing available this year, and if not, it would float.
12 It would have to be in April of 2023.

13 So we believe it's important to get a -- and
14 appropriate to get that hearing on the calendar so we can
15 keep things moving because one thing we may also be talking
16 about today or at least at the next conference is what
17 happens after class cert.

18 So obviously we have to take the step of class
19 cert to get to the next step, and we believe the hearing at
20 that point is appropriate. We have also submitted, the
21 cases are set forth in the briefing, that an evidentiary
22 hearing is neither necessary or appropriate in this
23 instance.

24 And we would have simply a normal hearing, which
25 is common in the class certification motions at this stage,

1 to have a hearing on December 19th or as soon as the matter
2 could be heard by the Court so that we can keep the
3 schedule moving.

4 Thank you, Your Honor.

5 THE COURT: All right.

6 MR. TAYLOR: Thank you, Your Honors. Again,
7 Jared Taylor.

8 Defendants obviously disagree, and our position
9 is largely set forth in the joint letter to which Mr. Pouya
10 referred. Just briefly, there is no reason to accelerate
11 the class certification proceedings as plaintiffs propose.
12 We all agreed to the schedule that is currently set in
13 June.

14 The Court's criminal trial between, in January
15 and March will not delay those proceedings materially, if
16 at all, practically speaking. An April hearing date for
17 papers that close in January is not a material delay.

18 There was a similar time, I believe, between the
19 close of the papers on the motions to dismiss and the
20 hearing on the motions to dismiss. Three months interim in
21 that period is not going to significantly alter the shape
22 of this case.

23 What it would do is truncate the time that
24 defendants have to depose plaintiffs' experts and work on
25 their reply in the *Daubert* motions. As Mr. Pouya noted,

1 plaintiffs' proposed alterations to the deadline do not
2 move up plaintiffs' deadline to file and serve their reply
3 in support of their motion for class certification.

4 Defendants need that reply to understand the
5 context of their experts' positions in their report so that
6 they can adequately depose those experts. So that
7 effectively gives defendants less time than they would
8 otherwise currently have to depose those experts and then
9 to incorporate that deposition into their own replies on
10 the *Daubert* motions by December 12th.

11 Plaintiffs then propose having a hearing just
12 five business days after that. As Your Honors are aware,
13 these papers are voluminous. They are complicated.
14 Defendants submit a five-day period between the close of
15 the papers and a hearing on something this critical and
16 complicated will rob both defendants of their opportunity
17 to adequately present their case and the Court of the
18 opportunity to adequately consider it.

19 I note we have already been here for what is a
20 relatively simple status conference, about 30 minutes.
21 Defendants respectfully submit that an hour and 30 minutes
22 is not sufficient time to adequately vet all of the issues
23 that will be before the Court.

24 We intend to request an evidentiary hearing, as
25 noted in the joint letter, and even if an evidentiary

1 hearing were not granted, although those are typical in
2 cases like this, even attorney argument will likely take
3 more than an hour and a half, defendants submit, to be
4 safe.

5 The one last point in opposition to moving the
6 schedule is that on October 4th, so just earlier this
7 month, plaintiffs asked defendants to make their experts
8 available for deposition in the event that the hearing is
9 set for December 19th.

10 Defendants were able to do so for a date in late
11 October for one of their experts. For the other expert,
12 they were simply unable to, having gotten that request only
13 on October 4th. The rest of October was full with respect
14 to our expert's professional calendar.

15 He has other obligations that I understand are
16 not something as simple as a vacation or days off but
17 actual professional commitments throughout the month. So,
18 you know, that's just another example of the kind of wrench
19 that would unnecessarily be thrown into the works with a
20 late alteration to the schedule such as this.

21 Thank you, Your Honors.

22 THE COURT: All right. Do you wish to reply?

23 MR. POUYA: Just briefly, Your Honors. So I
24 think the positions have been set forth based on the
25 argument and in the papers. The only things I would add

1 is, we're obviously willing to work with the Court to put
2 together whatever, whatever structure is appropriate. We
3 were simply concerned about this, this four-month spread
4 that is potentially between these hearings.

5 So we would appreciate whatever consideration
6 that the Court may provide to put something that works on
7 calendar to keep the case moving. That's our primary
8 concern.

9 THE COURT: All right. Anyone else wish to speak
10 on this subject?

11 Okay. Here's what I'm inclined to do: I'm
12 inclined to have the hearing sometime in late January. It
13 could spill into early February, but that time frame. I do
14 have a criminal trial, the magazine fraud case, although
15 one never knows if that is going to actually go.

16 One of the persons scheduled for that trial, the
17 big first trial, has just pled guilty, and that may change
18 how that works, but I would just as soon have this moving
19 along. I think December 19th, I appreciate the concern for
20 speed in moving everything along, I think that's a little
21 bit too early.

22 And so I would be inclined to set a date that
23 works for the parties probably in late January. I think
24 that works best for the Court's schedule, and even if I'm
25 in trial, I will take the day off for this hearing, and I

1 will probably set up --

2 I guess at this point I'm not inclined to do an
3 evidentiary hearing. I don't really think that's
4 necessary, but certainly will set aside enough time, and
5 the parties should talk about how much time they think they
6 need for the arguments, and we'll accommodate that.

7 MR. POUYA: Thank you, Your Honor. We appreciate
8 the Court's consideration.

9 THE COURT: You can, Heather, you can work with
10 them in setting up a date that will work in the latter part
11 of January. Okay?

12 All right.

13 MR. TAYLOR: Your Honor, may I ask one clarifying
14 question?

15 THE COURT: Sure. Absolutely.

16 MR. TAYLOR: Defendants obviously haven't had the
17 opportunity to discuss the Court's inclination. I think
18 January and February will work well for defendants, and we
19 can be prepared by then.

20 With respect to the evidentiary hearing, I
21 frankly don't know the consensus among the group as to how
22 critical that is and whether we think it would be something
23 worth fighting for, but we don't want to do something that
24 the Court is not telling us to do.

25 Would the Court accept papers should we think

1 that it's a critical issue for defendants?

2 THE COURT: That would be fine. If you can get
3 that in quickly, that would be helpful and then any reply
4 by the plaintiffs so we can make that a conclusive
5 decision. I'm not inclined to do it, but I will listen to
6 your argument if you have arguments you wish to make on
7 that.

8 MR. TAYLOR: Thank you, Your Honor.

9 THE COURT: Okay. All right. We'll leave enough
10 time for this, but you should talk about how much time you
11 think you need for the arguments, and we'll set aside the
12 time.

13 All right. Let's see. I've noted at least the
14 mention of some potential Rule 11 issues that are lurking.
15 So let's talk about the consolidated complaint first which
16 might resolve this. I think we have a request for a 30-day
17 extension there.

18 Anyone wish to speak about that?

19 MR. EDDY: David Eddy, Your Honor. I spoke with
20 Jared Taylor over the last few days. We have an agreement
21 in principle to extend the DAPs' filing date of the
22 consolidated complaint 30 days to December 5. December 12
23 would be the date we, the parties, submit a proposed order
24 for the process of later filed DAP cases.

25 THE COURT: Okay.

1 MR. EDDY: And then January 20 would be the date
2 for the defendants' response to the DAPs' consolidated
3 complaint.

4 THE COURT: Sounds fine with the Court.

5 Is it okay with defense?

6 MR. TAYLOR: Yes, Your Honor. That reflects what
7 we discussed and agreed to.

8 THE COURT: Okay. Good. I think that works out
9 just fine.

10 MR. EDDY: Thank you.

11 THE COURT: The 30 days was a little short, and I
12 appreciate the fact that it's not an easy task to put
13 together a consolidated complaint, but I think in the end
14 it will make this work a lot better, so --

15 MR. TAYLOR: Your Honor, I'm not sure whether,
16 whether that's all the Court had for the moment on the
17 consolidated complaint. If -- we did have one other issue
18 that we wanted to raise with respect to that before we move
19 topics.

20 THE COURT: Yeah. Go ahead.

21 MR. TAYLOR: When DAPs requested their extension,
22 defendants asked, you know, what's -- we would not have any
23 problem with an extension. We grant those more or less as
24 a matter of course, of course, but we did ask what was
25 necessitating the extension if there was something

1 particular and particularly whether DAPs expected
2 substantive amendments instead of more or less an
3 administrative consolidation.

4 And the response we got was, "DAPs need the
5 additional time to harmonize and update their complaint
6 language."

7 So defendants would like to clarify that this
8 process is not intended to invite or even permit
9 substantive amendments at this point and that it should be
10 a consolidation of the allegations that have already been
11 brought. A consolidation will streamline the case.

12 Defendants believe that pivoting to new theories
13 or substantial allegations at this point would instead
14 disrupt it, and there was of course an agreed date for
15 bringing motions to amend, which was by April 30th, 2022.
16 Either all or nearly all DAPs did in fact amend by that
17 date, and Judge Bowbeer was clear at a January status
18 conference that any amendments after that time would
19 require not only a motion to amend but good cause to move
20 the scheduling order.

21 So we just don't want to be dealing with
22 surprises at this point.

23 THE COURT: Anyone wish to speak to that?
24 Mr. Kaplan?

25 MR. KAPLAN: Yes, Your Honor. We've had -- it's

1 Robert Kaplan.

2 We've had a lot of discovery, and we assume that
3 we can use material from discovery in this amended
4 complaint and if there are already claims that are pled, we
5 can re-plead those claims, and if one DAP didn't plead
6 those claims wants to plead those claims, they can do that.

7 That's what we did in Broilers. When we did the
8 consolidated complaint, we updated all the facts from
9 discovery, so we assume we can do that.

10 THE COURT: But you're not talking about new
11 causes of action.

12 MR. KAPLAN: Not that I'm aware of, but I don't
13 want to bind all the DAPs. We have not discussed this.

14 THE COURT: It's a consolidation of what has been
15 done up until this point, so I'm not really expecting
16 substantive amendments. If you feel that there is
17 something critical that needs to be added, you can file a
18 motion with the Court.

19 MR. KAPLAN: All right, Your Honor. I assume we
20 can add facts from discovery.

21 THE COURT: That's fine. I don't have a problem
22 with that.

23 Yes?

24 MR. BATES: Just briefly, Your Honor. Kyle Bates
25 from Hausfeld for Puerto Rico.

1 One point of clarification, and it's mostly a
2 nomenclature issue. My understanding was that defendants
3 and Direct Action Plaintiffs agreed that Puerto Rico would
4 not need to sign on to a consolidated amended complaint.

5 Puerto Rico's operative complaint has been
6 answered by all defendants, and we just wanted to confirm
7 that that was the Court's understanding in issuing the
8 pretrial order.

9 THE COURT: That was my understanding. Did you
10 have any point on that?

11 MR. TAYLOR: No, Your Honor. We agree.

12 THE COURT: That's fine, Mr. Bates.

13 Okay. All right. Let's see. I take it there is
14 nothing new on the status of the two state court actions
15 that are going on and nothing new to report there?

16 MR. TAYLOR: Correct, Your Honor.

17 THE COURT: Okay. In terms of, it looks like
18 there is some, still some jurisdictional issues. Maybe
19 discovery has started in New Mexico. They seem to be a
20 little bit behind; is that true?

21 MR. TAYLOR: Yes. I believe some jurisdictional
22 issues are still outstanding. I don't believe discovery
23 has started in earnest. We have just gotten a protective
24 order on file.

25 THE COURT: All right.

1 MR. TAYLOR: But it's starting.

2 THE COURT: Okay. Very well. What I would
3 intend to do if necessary is just, you know, try to make
4 sure that we harmonize timing as much as possible with
5 state court actions, and if there is anything that the
6 Court needs to do, you can let me know, but I think that
7 it's best to have them moving along the same track at the
8 same time as much as possible.

9 All right. Nothing we need to discuss about
10 settlement. We will have the final fairness hearing at the
11 end here. Leadership structure, got some ideas here.
12 Anyone wish to talk about that at this stage?

13 I anticipate issuing a order after this hearing,
14 consulting with Judge Docherty, and getting this matter
15 moving, but is there anything anyone would like to discuss
16 on this?

17 Mr. Bruckner?

18 MR. BRUCKNER: Good morning, Your Honors. Joe
19 Bruckner for the Direct Purchaser Plaintiffs.

20 As Your Honors know, we did petition the Court to
21 be appointed lead counsel for the direct purchasers. The
22 Court granted that order back in 2018. To cut to the
23 chase, if the Court needs more information from us, we're
24 happy to provide it, but otherwise we will stand on our
25 papers.

1 Not to speak for the other two classes, but I
2 believe they're in a similar situation, and they sent a
3 similar letter to the Court apprising you of such. So
4 unless the Court has questions, I'm happy to sit down.

5 THE COURT: I don't, Mr. Bruckner.

6 Anyone else? Mr. Hedlund?

7 MR. HEDLUND: Yeah. Just to echo Mr. Bruckner's
8 statements, the consumer indirects are the same, and my
9 co-lead counsel Shana Scarlett from Hagens Berman is on the
10 phone, so she is here virtually, but we stand on the
11 papers.

12 THE COURT: All right. Very well.

13 MR. FINLEY: And, Your Honor, Blaine Finley for
14 the commercial indirects.

15 We stand on our papers as well and echo the
16 comments of the other two classes.

17 THE COURT: Okay. Very well. Anyone else?

18 Okay. We will get that order out quickly. I
19 appreciated receiving information from everyone, and I
20 understand, Mr. Bates, we've got a kind of a separate
21 request for Puerto Rico. I do think that separate
22 representation in case-wide leadership for the Commonwealth
23 is probably in order.

24 MR. BATES: Thank you, Your Honor.

25 THE COURT: Okay. Thank you for the suggestion

1 of the monthly status conferences. We will start plugging
2 those in and getting the timing associated with everything
3 else that is going on.

4 I do think that it would be helpful for in
5 advance of the monthly status conferences that we have a
6 joint agenda so we make sure we address everything that
7 both sides wants. So I will expect the leadership to work
8 together on a joint agenda for each of these conferences.

9 Mr. Hedlund?

10 MR. HEDLUND: Just briefly, and kind of just a
11 date issue, but I noticed that, we noticed that one of the
12 dates that we had suggested was January 16th, which is
13 Martin Luther King Day, so that will need to be adjusted,
14 but otherwise I think they're all good.

15 THE COURT: That would not be a day we should
16 have a conference so --

17 Mr. Pouya?

18 MR. POUYA: Your Honor, how far in advance of the
19 hearings do you want the agendas?

20 THE COURT: If we could get it at least three
21 days in advance, that would be helpful.

22 MR. POUYA: Okay.

23 THE COURT: All right. Let's see. I think that
24 in terms of the pretrial schedules, Judge Docherty
25 referenced that. I think that we should focus on that as

1 being a primary issue for a November conference if everyone
2 can get together on a schedule, and we're inclined to be
3 approving of any schedule the parties can agree to. I do
4 want to move the matter along as quickly as possible.

5 Part of the case is old. The rest of it is
6 relatively new, but I do want to move things along as
7 quickly as possible. So the schedule I think we can
8 probably address in November.

9 Judge Docherty, what do you think?

10 MAGISTRATE JUDGE DOCHERTY: I agree. I agree. I
11 think the parties need to meet and confer about some of
12 that before it's ready for us.

13 THE COURT: Okay. I would anticipate a fairly
14 firm schedule, of course subject to what goes on in the
15 case, but have that ready by the November status
16 conference.

17 Okay. And then in terms of the timing on class
18 certification and the related *Daubert* hearings, we will --
19 do you have a date in mind, Heather, for a hearing? Did
20 you look at the January calendar at all?

21 COURTROOM DEPUTY: I was looking at it. The last
22 of week is pretty open if you want to just pick a day.

23 THE COURT: We may be done with whatever trial we
24 have then anyway. So last week in January, let's work back
25 from that. Is there a date that week that is, has a big

1 conflict for anybody? The week is fairly open for the
2 Court, if you could check your calendars.

3 This would be, we would set aside a day. It's
4 not going to be a day-long hearing, I don't think, but we
5 will set aside plenty of time for it. So look at a date
6 that is relatively clear last week in January.

7 MR. BRUCKNER: Your Honor, Joe Bruckner. That
8 would be the week of January 22 or 29?

9 COURTROOM DEPUTY: I'm thinking Monday the 30th
10 on. Monday, Tuesday, Wednesday is pretty good for you.

11 THE COURT: First part of that week, Monday
12 through Wednesday.

13 MR. BRUCKNER: Your Honor, that's fine for the
14 Direct Purchaser Plaintiffs.

15 THE COURT: Any conflicts anyone has Monday,
16 Tuesday, Wednesday that week?

17 MR. TAYLOR: I don't think we will have any
18 conflicts, Your Honor. Maybe if we do, we can shortly
19 after this conference apprise the Court.

20 THE COURT: That's fine. Let's set it for
21 Tuesday, which is what date, Heather?

22 COURTROOM DEPUTY: January 31st.

23 THE COURT: January 31st, we will set aside that
24 date, and if there is any conflicts please let me know
25 right away. We can move it if necessary. Okay?

1 And then maybe the parties can work back from
2 that date in terms of the relative responses that are due
3 before then. Okay? All right. Anything else besides the
4 final fairness hearing and the attorneys' fees order for
5 Smithfield.

6 Yes?

7 MR. POUYA: On that last point, I hope to
8 streamline it. Since we're not moving on a *Daubert*, I
9 think the current deadlines can remain in place for that
10 hearing date.

11 MR. TAYLOR: Yeah. No objection.

12 THE COURT: You would have time after the last
13 filings are in to prepare for the hearing, so I think it
14 was a, five days is a little short. I agree with that. So
15 hopefully you won't have to be doing too much work over the
16 holidays this way.

17 MR. POUYA: Thank you, Your Honor.

18 THE COURT: Okay. All right. Any other issue we
19 should discuss today?

20 Did you have anything, Judge Docherty?

21 MAGISTRATE JUDGE DOCHERTY: I have nothing
22 further. Thank you.

23 THE COURT: All right. Okay. We will issue an
24 order shortly on the leadership structure. I appreciate
25 the parties' submissions. Everything seemed to make good

1 sense to me, so we will issue an order on that. You're
2 going to address the Canadian deposition issue and the
3 other order that is pending.

4 So anything else for today? All right. Well,
5 thank you all for coming in today. Again, I appreciate it
6 very much. I just felt that it would be helpful to have an
7 initial conference where we were all together here in the
8 courtroom, and we will do most of our work going forward
9 over Zoom.

10 If we're doing any evidentiary related matters,
11 we will probably do that in person, and we may actually,
12 the class certification motion, we may do that in person,
13 but certainly our monthly status conferences I anticipate
14 using Zoom for that to save on everybody's travel costs.

15 All right? Thanks very much for coming in today.
16 We will be in recess.

17 COURTROOM DEPUTY: All rise.

18 THE COURT: Actually we should turn to the
19 Smithfield final fairness hearing. Anyone not involved can
20 leave if you want to. Otherwise we will take that up right
21 now.

22 **(Magistrate Judge Docherty exits the courtroom.)**

23 THE COURT: Let's proceed. We have a final
24 fairness hearing today on the Smithfield settlement with
25 Commercial and Institutional Indirect Purchaser Plaintiffs.

1 MR. RAITER: Thank you, Your Honor. Shawn Raiter
2 on behalf of the Commercial and Institutional Indirect
3 Purchaser Plaintiffs.

4 As you know, we have a settlement here today for
5 final fairness consideration with the Smithfield
6 defendants. This is the second settlement that the
7 Commercial Indirect Purchasers have entered. This would be
8 a total of roughly 55 million dollars with the two
9 settlements.

10 The settlement with Smithfield is a 42 million
11 dollar, all cash, no reversion settlement that includes
12 cooperation. It includes injunctive relief, which is set
13 forth in the proposed order and in the long form settlement
14 agreement.

15 We have had no objections, no opt-outs. The
16 Court is certainly familiar with the standard that you
17 apply on a Rule 23 final fairness, so I don't intend to
18 click through those factors unless you have questions about
19 them in particular.

20 So factually what we will go through is the
21 notice that we provided, which was carried out as the
22 declaration of Cam Azari sets forth. That notice included
23 direct mail, notice via e-mail to about 90 some thousand
24 restaurant associated e-mail addresses. These are classes
25 that are difficult to identify everyone. There is no list.

1 There is no census. There is no thing that tells us
2 exactly where to find them.

3 So they put together information from different
4 sources to come up with a group of e-mails, and about
5 90,000 as I said or more than 90,000 were sent. We roughly
6 estimate the class to be somewhere north of 300,000
7 members, 350, maybe. So we got we believe direct mail
8 notice to about a quarter of the class roughly.

9 We then did media outlets. We did social media,
10 paper click banner ads, and the reach according to the
11 experts was something north of 70 percent, with each of
12 those institutional purchasers receiving notice at least
13 two times.

14 We have filed with the Court the CAFA notice
15 compliance that the defendant provided. We have not heard
16 anything from any of those recipients. So the notice we
17 believe was effective, was efficient, was fair and
18 reasonable under the circumstances, and we've heard nothing
19 to the contrary.

20 This being the second settlement, one thing that
21 we see in cases like this is there is some public awareness
22 of these lawsuits just by Internet presence and media
23 presence, and typically if someone wants to know about the
24 case they can find the information.

25 We have had the settlement website for the first

1 settlement up and running and documents being posted for
2 this settlement as well. So the reaction obviously from
3 the class was good. It was well-received. We think the
4 settlement was fair and reasonable under the circumstances.

5 We do have the benefit of some expert input about
6 the volume of commerce and estimated damages. We have not
7 put those in the papers given where we stand right now with
8 the defendants, but we believe that the settlement if the
9 Court has questions or wants more information, we would be
10 happy to give it to you in camera.

11 But we believe this is a good resolution given
12 Smithfield's participation, given its volume of commerce
13 and given the presence of the remaining defendants in the
14 case who still have joint and several liability for the
15 full amount, as you know.

16 The agreed injunctive relief is an agreement that
17 Smithfield will not commit a per se violation of Section 1
18 of the Sherman Act for 24 months. That would be in your
19 order, and obviously this is complex litigation, and
20 settlements are favored. This was the result of
21 substantial negotiations.

22 We did not use a mediator, but we negotiated a
23 long time with very able defense counsel, and it was dozens
24 of communications that resulted finally in the terms that
25 we have before you. So I know that Your Honor will give

1 counsel's opinion some weight. We know you're familiar
2 with the case law, and I believe we can wholeheartedly
3 support this settlement.

4 We are not asking you at this point to approve a
5 plan of allocation for either this settlement or the JBS
6 settlement. We will do that at some point when we think we
7 have enough money, hopefully maybe some more if we were to
8 reach other settlements, to justify the costs of starting a
9 claim administration and a claim process.

10 But the idea in a settlement like this is you
11 would be looking at the pro rata share that a class member
12 would have based on their pork purchases of some sort, and
13 you would have some data that we now have from certain
14 sources in the case, third-party sources in particular,
15 that does show some transactional purchase history that we
16 will probably use in some kind of a pro rata allocation at
17 some point, but that would be the subject of a future
18 motion we would ask you to approve, an allocation plan and
19 an allocation process.

20 We have asked for attorneys' fees of 33 percent
21 of the gross amount after the deduction of notice and
22 administration and after the deduction of a future
23 litigation costs set-aside. The total amount sought as set
24 out in the papers, that's \$13,270,913.12.

25 That represents about 31 percent of the gross

1 settlement fund if you went at it that way, and that
2 approach, by having taken out the notice costs and the
3 future litigation expenses, something that the Court has
4 approved in the past, and that's the request based on the
5 time that we have in the case.

6 We have set out, Your Honor, the number of hours
7 in the case, the relative rates. We have got at the time
8 this was submitted in July of 2022 about 16,800 attorney
9 hours, 2600 hours for paralegals and law clerks. The
10 Lodestar at that time was \$12,450,000.

11 If Your Honor was to approve the fee request,
12 that would result in a positive multiplier of 1.38, which
13 as Your Honor knows from the case law is well within
14 reasonable amounts. The litigation continues. That
15 Lodestar multiplier will have already decreased as of today
16 because we continued to work.

17 And as you know, the class certification process
18 is well underway, and we still have depositions being taken
19 of some of our clients, and whether we settle or not with
20 anybody else remains to be seen. So we think that that's a
21 reasonable fee request given the work that has been done,
22 the risk that's been taken, the investment that has been
23 made.

24 We have asked for reimbursement of 1.6 million
25 dollars in past expenses. That was put out in the long

1 form notice again and the short form notice, and we've
2 received no response from any class member about those past
3 costs. Those costs are in addition to the \$1,020,000 that
4 the Court previously awarded as a future litigation fund.
5 We went through that fund, and we went another million six
6 out-of-pocket already.

7 Those costs, Your Honor, the majority of them are
8 expert related and data related.

9 THE COURT: There is one discrepancy there,
10 Mr. Raiter, I just wanted to ask about. I'm not sure it's
11 a problem, but the e-mail notice says not to exceed 1.4
12 million, and you've incurred some more expenses since that
13 time?

14 MR. RAITER: Yeah. And so what we did in the
15 long form notice, I believe we had asked for up to 7
16 percent as a future set-aside. The long form notice asked
17 for only 5 percent. So essentially what happened was, we
18 went from a smaller past expense number and a larger
19 future, and we exchanged those for a larger past and a
20 smaller future.

21 So the future litigation set-aside amount that we
22 are requesting is 5 percent, and that was set out in the
23 notice, if that makes sense to Your Honor. We had been
24 incurring more expense by the time the notice finally was
25 sent.

1 THE COURT: That's fine.

2 MR. RAITER: So the notice, the long form again
3 said 5 percent as a future set-aside. That would equate to
4 2.1 million dollars. We are hopeful we won't go through
5 that at this point, but it remains to be seen whether we
6 will. We certainly have class certification and expert
7 reports in. We are working on our reply, the rebuttal
8 report.

9 We will have expert depositions. We will have
10 additional time. If any of that money remains, that money
11 would revert back into the settlement fund and would be
12 disbursed to class members. So we're certainly happy to
13 provide the Court with any accounting or information you
14 would need to see where the money is being spent.

15 But the vast, vast majority of it is going to
16 experts, data hosting, data cleaning, data acquisition.
17 Fortunately during COVID, we haven't had a lot of travel.
18 We have some reduction in what we would see in normal
19 litigation expenses because of COVID and because of Your
20 Honor's willingness to do things by Zoom.

21 So that's where we are on those costs, and we
22 would ask that we be reimbursed for those. We also asked
23 for class representatives service awards of \$7500 each. We
24 have eleven representative plaintiffs in the group. You
25 previously awarded \$7500 in the JBS settlement, so we would

1 have a total of \$15,000.

2 As you know, Your Honor, there is case law that
3 suggests that for businesses in antitrust cases you can see
4 awards exceeding \$100,000. Businesses in particular really
5 share a big burden in these cases. They have to go into
6 their business records. They actually have records to
7 produce. They have data to produce. They sit for
8 depositions.

9 Most of our representatives have already sat or
10 have still been requested for a deposition, and obviously
11 if we need to try the case, they're willing to come try the
12 case. So we believe an additional award from the
13 settlement is appropriate of \$7500.

14 We're in a -- these cases are interesting because
15 as these settlements go by, if we don't ask for a service
16 award from you at this point, we may lose the opportunity
17 to get it from the settlement. So we're trying to kind of
18 gauge. Feels like we should take something from each of
19 these if possible.

20 But we know there will be a point where Your
21 Honor may say that's too much money or that doesn't seem
22 fair. So what we are doing is trying to eek these out as
23 we go, and hopefully we might have other settlements or
24 something that we would come back and ask again. So this
25 may not be our last ask, but we are certainly aware that we

1 are asking more than once for a service award.

2 So, Your Honor, unless you have a questions, we
3 think this is a fair, reasonable, adequate settlement.
4 It's again the result of very, very hard fought litigation.
5 A lot of information exchanged. A good understanding of
6 the risks and benefits on both sides, both the plaintiffs
7 and the defendants, to proceeding in litigation like this,
8 and we think that this is a good result for this class.

9 THE COURT: All right. Thank you, Mr. Raiter.
10 Mr. Cotter?

11 MR. COTTER: Good morning, Your Honor. John
12 Cotter for Smithfield. I'm here with John Kvinge, and
13 Brian Robison is by phone.

14 We have nothing to add. The class counsel has
15 covered all the points, and so we have nothing to add. On
16 the issue of attorneys' fees we simply don't take a
17 position. That's between you and counsel for the
18 plaintiffs.

19 THE COURT: All right.

20 MR. COTTER: I have nothing else.

21 THE COURT: Thank you, Mr. Cotter.

22 Anyone else that's here wish to speak? All
23 right. I don't have any more questions.

24 Thank you, Mr. Raiter, for your comprehensive
25 outline of what has gone on in terms of the settlement

1 discussions and the notice that has been provided.

2 The Court finds that the settlement is in order,
3 and I don't have any disagreement with the attorneys' fees
4 request either. So I will issue the necessary orders. I
5 think we have a draft order on both that have been
6 submitted.

7 Am I correct?

8 MR. RAITER: You are, Your Honor.

9 THE COURT: Okay. We will get those out right
10 away, so thank you.

11 MR. RAITER: Thank you.

12 THE COURT: All right. Anything else for today?
13 Thank you, everyone. We will be in recess.

14 COURTROOM DEPUTY: All rise.

15 **(Court was adjourned.)**

16 * * *

17 I, Kristine Mousseau, certify that the foregoing
18 is a correct transcript from the record of proceedings in
19 the above-entitled matter.

20
21
22
23 Certified by: s/ Kristine Mousseau, CRR-RPR
24 Kristine Mousseau, CRR-RPR
25

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